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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL DELREAL,

Defendant and Appellant.

B262410

(Los Angeles County
Super. Ct. No. KA098112)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Vacated and remanded.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Miguel DelReal appeals from the judgment resentencing him after we remanded the case to the trial court, complaining that the trial court failed to recalculate and award him custody credits, failed to exercise its discretion in sentencing, and erred when it sentenced him in his absence. He also contends that the trial court displayed animus towards him during the resentencing hearing, and thus, appellant requests that a different judge resentence him on remand. Although we conclude that the matter must again be remanded for sentencing, appellant has not demonstrated that resentencing before a different trial judge is warranted.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, appellant suffered convictions for two counts of attempted murder (counts 4 and 5), two counts of felony firearm assault (counts 6 and 7) and one count of shooting at an occupied motor vehicle (count 8) for firing at a car occupied by two people. He was also convicted of auto theft (count 9), willful evasion of the police (count 10) and possession of a firearm by a felon (count 11). The jury also found true firearm, prior prison term, and gang enhancements.

The trial court sentenced appellant to an indeterminate term of 37 years to life on the conviction for shooting at an occupied motor vehicle (count 8) with the true findings on the firearm, gang and prison term allegations; a consecutive determinate term of four years for the auto theft (count 9); and a consecutive term of eight months for willful evasion (count 10), for a total sentence of 41 years 8 months in state prison.¹ Appellant challenged his convictions and sentence on appeal.

In October 2014, in *People v. DelReal* (Oct. 31, 2014, B249636) [nonpub. opn.] this court affirmed the convictions, but found insufficient evidence supported the gang

¹ In addition, the court imposed a sentence of three years for the conviction of count 11—possession of a firearm—to run concurrently with the sentence for count 8. The court also sentenced appellant to a term of seven years for each attempted murder conviction (counts 4 and 5) and a term of six years for each assault conviction (counts 6 and 7). The court further ordered the sentences on counts 4 through 7 stayed pursuant to Penal Code section 654.

enhancement findings. We remanded the matter with directions to the trial court “to vacate the gang enhancements” and “resentence defendant accordingly.”

In January 2015, the original trial judge Mike Camacho conducted the resentencing hearing. Although appellant’s trial counsel appeared, appellant, who was incarcerated in state prison, did not attend the hearing, and nothing was offered to excuse or explain his absence.

At the outset of the hearing, the court noted that originally appellant was sentenced to an “indeterminate” term because of gang enhancements, and explained that on remand absent the gang enhancements, it would sentence appellant to a “determinate” prison term. As a result, the trial court stated that it had “restructured” the sentence and intended to use count 4, one of the attempted murder convictions, as the base term. Thus, the trial court sentenced appellant to a determinate, high-term of nine years for count 4 and imposed one additional year for each of the prison priors.² The trial court then ordered that appellant serve an additional 20-year term based on the firearm enhancement for count 4 and stayed the remaining firearm enhancement under Penal Code section 654.³ The trial court also sentenced appellant to a term of 2 years 4 months, (one-third of the midterm) on the attempted murder conviction on count 5 to run consecutively with the sentence on count 4, stating: “This must run consecutive. Although it was the same occasion, it did involve a separate victim.” The trial court further imposed one-third (6 years 8 months) of the 20-year term for the firearm enhancement, resulting in a total term for count 5 of nine years. The court also sentenced appellant to consecutive terms of one year for count 9, and eight months

² Initially, the court miscounted the appellant’s prior prison terms, attributing to him six prior terms. The prosecutor pointed out that appellant has suffered two, not six prior prison terms. The prosecutor observed that the four other priors belonged to appellant’s codefendant, noting that the mistake in the record was due to some kind of a “computer glitch.” The trial court corrected the record and imposed sentence on appellant’s two prison priors.

³ All statutory references are to the Penal Code unless otherwise indicated.

respectively for counts 10 and 11. Accordingly, the court sentenced appellant to an aggregate term of 42 years 4 months in state prison.⁴

The trial court also stated that because appellant was in prison “the state prison system must calculate all of his postsentence credits earned as of the time of his initial sentence. So the court is not going to award any modified sentencing credits. They are all going to remain the same.” This appeal followed.

DISCUSSION

I. *Sentencing Errors.*

Appellant contends the trial court committed errors when it resentenced him. Specifically, the court failed to recalculate and award custody credits, and failed to exercise its discretion in sentencing on count 5. Appellant further asserts the court erred when it resentenced him in his absence.

A. *Failure To Calculate And Award Custody Credits.*

Appellant contends, the Attorney General concedes, and we agree, that the trial court was required to recalculate and award his custody credits to reflect the total amount of actual days defendant had spent incarcerated from his arrest through to resentencing and that the court erred in directing the state prison to calculate the credit for the total amount of actual days defendant spent incarcerated. “[W]hen a prison term already in progress is modified . . . the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29, 37.) Consequently, we remand to the trial court to calculate and award appellant credits for all of the actual days he spent incarcerated.⁵

⁴ The trial court imposed, but stayed under section 654, midterm sentences of six years each as to counts 6 and 7, a high term of nine years on count 8, and a 20-year term on the firearm enhancements as to count 8.

⁵ The parties also properly agree that appellant was entitled to be present for the sentencing hearing. (See § 977; *People v. Rodriguez* (1998) 17 Cal.4th 253, 260, fn. 5 [defendant has a constitutional right to be present at all critical stages of the criminal

B. *Failure To Exercise Sentencing Discretion.*

Appellant also contends that although the trial court had the discretion to impose either a consecutive or concurrent sentence on count 5, it imposed a consecutive sentence because it erroneously believed it was required to do so. Appellant is correct.⁶

Both parties properly agree that the trial court had the discretion to impose a concurrent or consecutive sentence for the count 5 attempted murder conviction. (See Pen. Code, § 669; *People v. Oates* (2004) 32 Cal.4th 1048, 1060; *In re Sandel* (1966) 64 Cal.2d 412, 416 [trial court has the discretion to determine whether several sentences are to run concurrently or consecutively].) They also concur that the existence of multiple victims is one basis upon which a court may exercise its discretion to impose consecutive sentences. (See *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365.)

Appellant and the Attorney General disagree, however, as to whether the trial court exercised its discretion when it sentenced appellant to a consecutive sentence on count 5 or instead imposed the sentence based on the erroneous view that it lacked the discretion to impose a concurrent term. When a matter entrusted to the trial court's discretion is properly presented, the court must exercise its discretion: "In such a case a statement or other evidence that the court believes it has no discretion, but must rule in a certain way, indicates an error so fundamental as to be said to amount to a refusal to

prosecution, including at sentencing].) Consequently, it is undisputed that the court erred in proceeding to resentence appellant in his absence. The appellant and respondent disagree, however, as to the prejudicial effect of this error. In view of our conclusion that this matter must be remanded, we do not decide this issue.

⁶ The Attorney General asserts this claim is forfeited because appellant counsel's failed to object in the trial court. We disagree. Here appellant does not complain about the manner in which the court exercised its discretion or the reasons it stated for imposing consecutive sentencing. (See *People v. Scott* (1994) 9 Cal.4th 331, 356 ["complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal"].) Instead, he is claiming the record discloses that the trial court erroneously believed it did not have discretion and had no alternative but to impose consecutive sentencing. Appellant may raise this claim on appeal. (See *In re Sean* (2005) 127 Cal.App.4th 1177, 1181-1182 [claim that court failed to exercise discretion not subject to forfeiture].)

exercise jurisdiction.” (*People v. Bolian* (2015) 231 Cal.App.4th 1415, 1421, quoting *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [“ ‘Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ ”].)

Here, the record discloses that the trial court believed it had no discretion to impose a concurrent sentence on count 5. When it imposed the sentence on the conviction, the court stated “this *must* run consecutive. Although it was the same occasion, it did involve a separate victim.” (Emphasis added.) The Attorney General contends that the remark concerning the separate victim was an explanation as to why the court chose to impose the consecutive sentence rather than an expression of mandate. We agree that the remark is susceptible of two interpretations but believe the absence of choice is the most reasonable interpretation given the context of the remark. The word “must,” immediately followed by the reference to the second victim, revealed the court’s belief that consecutive sentences were compelled because the crime involved a separate victim. Consequently, we will remand for resentencing to allow the court to exercise its discretion properly. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421 [“when the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion”].)⁷ In that resentencing, the court may consider defendant’s then circumstances.

II. *Resentencing Before a Different Judge.*

Appellant further requests that this court direct that a different judge resentence him because the trial judge’s remarks and sentence indicates animus inconsistent with judicial objectivity and that showed a lack of awareness of the legal requirements for sentencing.

⁷ Because this matter is subject to remand for the recalculation of appellant’s custody credits, we need not assess the Attorney General’s contention that the error is harmless.

Code of Civil Procedure, section 170.1, subdivision (c) provides that, at the request of any party, the “appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.” “[T]he statutory power of appellate courts to disqualify sentencing judges should be used sparingly and only where the interests of justice require it,” such as “where the [action] of the original judge indicates an animus inconsistent with judicial objectivity.” (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562.) Moreover, a bench officer’s legal error may warrant disqualification where it “suggests a whimsical disregard of the [legal] scheme that is incompatible with a judicious effort to comply with its complex terms.” (*Ibid.*) Nonetheless, “mere judicial error is not conclusive evidence of bias or grounds for disqualification.” (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1231.) Failure in the application of a complex statutory scheme “cannot be said to reflect a lack of objectivity implicating the interests of justice.” (*People v. Gulbrandsen, supra*, 209 Cal.App.3d at p. 1562.)

As discussed in this opinion, the trial court committed a number of errors, but the legal errors alone do not demonstrate a “whimsical disregard” of a statutory scheme. (*People v. Gulbrandsen, supra*, 209 Cal.App.3d at p. 1562.)

The defendant contends that the judge’s remarks during sentencing show animus. In our view, however, the record does not affirmatively show animus. The court explained its rationale for restructuring the sentence and offered both parties an opportunity to provide input on the proposed sentence during the hearing. The court further observed that appellant’s new sentence was more “favorable” than his prior sentence and that appellant had “received that type of generosity, albeit not what this court otherwise would have imposed.” Placed in their context, these remarks do not demonstrate bias or a lack of objectivity. Instead, the court was more likely reflecting on the impact of the reversal of the gang enhancements—in the absence of the gang enhancements, the court intended to impose a determinate sentence, rather than an indeterminate term—and that as a result, appellant received a sentence that the trial court

would not have otherwise imposed. The court then explained that although it had accepted appellant's lawyer's representation that appellant was a "changed man," the court, nonetheless, recalled that appellant showed no remorse at the time of trial and that the crime was serious.

The court's observations reveal its prior knowledge of the evidence and appellant as well as the court's experience as the trial judge in the case. Critical comments do not necessarily suggest a judicial bias. The bench officer " 'will normally and properly form opinions on the law, the evidence and the witnesses, from the presentation of the case. These opinions and expressions thereof may be critical or disparaging to one party's position, but they are reached after a hearing in the performance of the judicial duty to decide the case, and do not constitute a ground for disqualification.' " (*Haldane v. Haldane* (1965) 232 Cal.App.2d 393, 395; see *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 ["when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action"].) As the United States Supreme Court has observed: "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings." (*Liteky v. United States* (1994) 510 U.S. 540, 550-551.)

Here, the court's explanation betrayed no partiality, unusual personal involvement or improper motive. "Whatever the sting of reversal, vindictive retaliation against a successful defendant cannot be presumed to be the judicial reaction." (*People v. Gulbrandsen, supra*, 209 Cal.App.3d at pp. 1562-1563; cf. *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1023-1024 [disqualification warranted because trial judge showed "unusual personal interest in handling the case," record contained unidentified evidence of "potential bias towards petitioner and towards petitioner's appointed counsel," and

judge made “derogatory and apparently unfounded statements” regarding defense counsel], overruled in part on other grounds in *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1069; *In re Wagner* (2005) 127 Cal.App.4th 138, 147-148 [bias found where comment reflected personal involvement and reliance on matters outside the record].) Here, however, appellant has failed to show a sufficient basis to substitute a new judge.

DISPOSITION

The judgment is vacated and remanded to the trial court to (1) calculate and award appellant credits for all of the actual days appellant spent incarcerated and (2) to resentence appellant in accordance with this opinion. The trial court shall forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.